NOTES

CONSENT DECREES.—A consent decree is an order issued by an equity court of competent jurisdiction which formally adopts the agreement of the litigants.[1] Suppose that the president of a corporation signs a note on behalf of himself and the corporation, and gives a personal mortgage to secure its payment. The payee now sues in equity for the foreclosure of the mortgage and recovery of the money due. He secures a decree against the corporation and the president. The corporation appeals. Before the case is decided on its merits, the plaintiff agrees that he will first sell the mortgage property, and the defendant agrees that he will then pay the balance. The court turns this agreement into a decree.[2] This decree may incorporate a compromise arrangement made after a finding of facts in the court below. Such circumstances are merely incidental. Many decrees are based on a consent to the relief demanded, which is given before any finding of facts, and without a counterclaim for a corresponding concession.[3] Despite many undoubted advantages and a favorable public policy, consent decrees have been relatively little used;[4] but if a decree promulgated about two years ago, an application for the modification of which is now pending, is ultimately sustained, it will afford a conspicuous example of a novel form of decree which will commend itself in various types of controversy. The United States, by the Attorney General, charged the defendant packers with violating the Sherman Law, and asked that they be enjoined from conspiring in restraint of trade. The defendants denied the allegations, but offered to consent to a decree enjoining the practices complained of, the decree conditioned on such consent not being deemed an admission of any violation of the law. The consent was given to avoid even the appearance of hostility to the government.[5] A decree embodying these terms was accordingly granted in *United States* v. *Swift et al.* (Sup. Ct. D. C. 1920) No. 37623, Equity.[5a]

This decree may seem invalid. Courts of equity derive jurisdiction over the type of case made out in the complaint from two sources. One is the special jurisdiction conferred by the anti-trust laws, which specifically charge the courts with the duty of enjoining violations;[6] the other is the general jurisdiction over

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[1] A typical consent decree is in *New England Mortgage Co.* v. *Tarver, etc. Co.* (C. C. A. 1894) 60 Fed. 660.

[2] *First Nat. Bank, etc.* v. *Northwestern Water, etc. Co.* (Iowa 1898) 74 N. W. 772.

[3] *E. g.; Coultas* v. *Green* (1867) 43 Ill. 477; *Fletcher* v. *Holmes* (1865) 25 Ind. 458.

[4] A search of the digests has disclosed less than one hundred and forty cases. Allowing for those overlooked and many not reported, their number is insignificant compared with the vast amount of litigation in general and judgments at law by consent. Its non-use may be accounted for in two ways: first, that it is only in equity actions that such a decree can be entered at all, and commercial transactions where consent decrees can most profitably be used, are commonly not subject to equity jurisdiction; secondly, its possibilities have not been clearly understood.

[5] "The defendants . . . assert their innocence of any violation of law . . . nevertheless desiring to avoid every appearance of placing themselves in a position of antagonism to the government . . . "

[5a] In a letter dated Feb. 25, 1922, printed in (1922) Senate Doc. 145, the Attorney General discusses the economic situation resulting from this consent decree. The Document also contains a letter from an inter-departmental committee, which notes the legal problems of the decree which will be raised by an imminent petition for its modification.

[6] 26 Stat. § 4, 209, U. S. Comp. Stat. (1916) §§ 8823, 8835.

present or threatened offenses when they tend to irreparable damage.[7] In either case an offense must be proved.[8] The typical consent decree dispenses with the necessity of proof, for the defendant agrees to the issue of the order. Nevertheless, the consent is not an admission of the allegations in the bill. It is simply an expression of willingness that the complainant get the desired relief. Various reasons, though the defendant knows himself to be innocent, may motivate it—a knowledge that though the present allegations are unfounded, similar relief could be gotten on another bill, after protracted litigation; or business; or family policy. The consent likewise prevents a finding of facts.[9] Hence the decree cannot be pleaded as *res adjudicata*.[10]

The apparently dubious nature of the decree in the instant case results from the stipulation which it incorporates. The order begins by asserting that the petition states a cause of action under the Sherman Law. Of course it follows that the court has jurisdiction. Almost immediately thereafter comes the stipulation of the defendants: their consent to the order is conditioned upon its not being deemed an admission of any of the offenses charged in the petition. By its incorporation into the decree, the stipulation is made a part thereof. This in effect seems to remove the grounds of special and general jurisdiction set out in the opening paragraphs of the decree. In other words, the court says that it has jurisdiction because the anti-trust laws have been violated, and in the next line, cuts the ground from under its feet, by accepting the declaration that there have been no violations.[11]

The fallacy of this view lies in the interpretation given the stipulation. True the stipulation precludes any assumption of an admission of guilt on the part of the defendants. Indeed, as a stipulation is equivalent to a finding,[12] it is a conclusive statement that there has been no admission. But the court need do no more than by a legal fiction assume guilt. It is given authority to allow relief when the facts are established; the defendant by his consent eliminates the necessity for evidence, and permits his guilt to be taken for granted. The stipulation

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[7] *Attorney General* v. *Fitzsimmons* (Ark. 1896) 1 Ames, *Cases in Equity Jurisprudence* (1904) 622; see (1917) 17 COLUMBIA LAW REV. 707.

[8] The offense proved is necessarily a crime. One who was adversely affected in his property rights might enjoin these practices on the ground of general equity jurisdiction, but the Attorney General can restrain it only as a violation of the Sherman law, *i. e.*, as a crime. *Cf.* (1917) 17 COLUMBIA LAW REV. 407.

[9] *Kelley* v. *Town of Milan* (C. C. A. 1884) 21 Fed. 842.

[10] *Texas, etc. Ry* v. *Southern Pac. Ry.* (1890) 137 U. S. 48, 11 Sup. Ct. 10.

[11] What if this view be sustained? Does the defect constitute the decree void or reversible error? While courts have frequently spoken of differences between jurisdictional facts and errors in the application of the law, none has satisfactorily distinguished them on any sound basis. It seems plain that if a court of law were to issue an injunction, the order would be void as a court of law has no jurisdiction to give such relief. Where the court has no jurisdiction over the subject matter, the parties cannot by their consent give it jurisdiction. *Parkhurst* v. *Rochester L. M. Co.* (1892) 65 Hun 489, 20 N. Y. Supp. 395; *Road District No. 6* v. *McKinney* (Ill. 1921) 132 N. E. 529; *Plano Mfg. Co.* v. *Rasey* (1887) 69 Wis. 246, 34 N. W. 85. It is equally clear that if in a specific performance case, a court should grant relief where the weight of evidence did not favor it, the mistake would be reversible error. How about the middle ground, where a court orders specific performance of a contract to sell ordinary chattels? Is the judgment void or merely reversible? See (1915) 15 COLUMBIA LAW REV. 106. Probably the difference is one only of degree. The practical justification for the discussion lies in the different results attending civil contempt proceedings for the violation of injunctions in void and reversible proceedings. *Christensen* v. *People* (1904) 114 Ill. App. 40, *aff'd* (1905) 216 Ill. 354, 75 N. E. 108 (reversible); *In re Hall* (1862) 10 Mich. 210 (void); *cf. Flower* v. *MacGinniss* (C. C. A. 1901) 112 Fed. 377 (void).

[12] See *Roemer* v. *Neuman* (C. C. 1886) 26 Fed. 332, 334.

is merely a declaration of the well-settled rule that a consent to a decree is not an admission of the averments of the bill.[13]

By viewing consent decrees from another angle the same result is reached. Factually, and as recognized by many cases, a consent decree is no more than an order for a specific performance of a compromise arrangement.[14] It is closely akin to a contract of arbitration. In either of the situations, the defendant does not admit the contentions of the opposing side. He submits only to the judgment or the decree. The court in issuing the decree does not express any views as to the merits; it merely declares, "So have the parties agreed."

The only difference between them—and it is one which should popularize the decree—is in the form. The ultimate judgment in a court of law is for money. But even a money decree, in a court of equity, may say much more than that the defendant is ordered to make a certain payment. It may include the stipulations of the litigants. The stipulations may include a complete recital of all the motives and circumstances which lead the parties to consent to the decree. One who is being sued in equity may consent to a decree because he feels that a money settlement is preferable to extended litigation, though he may be convinced that his own cause is just and legal. Such a recital may go in the decree which orders him to pay the money. The saving of self-pride, and the opportunities offered for advertising one's integrity to business associates under official seal are inestimable.

Decrees by consent are more binding than those issued *in invitum*.[15] The latter are subject to modification by the same court,[16] and reversal by higher courts.[17] Errors of law or of inferences from the facts invalidate them. Consent decrees, on the other hand, are preclusive on the issues between the parties, on appeal.[18] Consent operates as a waiver of all procedural and formal defects.[19] Questions as to whether the complainant would have sustained his case had the issues been tried are irrelevant.[20] Even mistakes as to the law governing the rights of the parties are immaterial.[21] The decree issued by consent cannot be modified, except by consent.[22] Only where the consent has been obtained by fraud[23] or given by mistake[24] will a bill be entertained to set it aside. Under these circumstances it can also be attacked on a bill for execution.[25] The

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[13] This is vividly exemplified in *In re Estate of Henry Schönheit* (Probate Ct. of Kalamazoo, Mich. 1919). Contest over property of intestate. The litigants were an alleged illegitimate daughter and the intestate's brothers and sisters. The court handed down a decree which expressed the conflicting claims, and then ordered a division of the property in accordance with the agreement of the parties. The averments of neither party as originally made warranted the relief granted.

[14] *Hohenadel* v. *Steele* (1908) 237 Ill. 229, 86 N. E. 717; *Myllius* v. *Smith* (1903) 53 W. Va. 173, 44 S. W. 542; *cf. Driver* v. *Wood* (1901) 114 Ga. 296, 40 S. E. 257.

[15] *Schermerhorn* v. *Mahaffie* (1886) 34 Kan. 108, 8 Pac. 199.

[16] *Fulton Inv. Co.* v. *Dorsey* (C. C. A. 1915) 220 Fed. 298. Of course this is only true when equity retains jurisdiction, or the complainant must invoke its aid to execute the decree.

[17] *Farmers & Merchants Bank, etc.* v. *Arizona Mutual, etc. Ass'n* (C. C. A. 1915) 220 Fed. 1.

[18] See cases *supra,* footnotes 15 and 19 and *infra,* footnote 20.

[19] *Adler* v. *Van Kirk Land, etc. Co.* (1897) 114 Ala. 551, 21 So. 490; *cf. Webb* v. *Webb* (1676) 3 Swans. 658.

[20] *Schmidt* v. *Oregon Gold Min. Co.* (1895) 28 Ore. 9, 40 Pac. 406, 1014.

[21] *The Alcorn County* v. *Tuscumbia, etc.* (1912) 102 Miss. 401, 59 So. 798; *Ingles* v. *Bryant* (1898) 117 Mich. 113, 75 N. W. 442.

[22] *McGraw* v. *Traders Nat. Bank* (1908) 64 W. Va. 509, 63 S. E. 398; *Thompson* v. *Maxwell, etc. Co.* (1897) 168 U. S. 451, 18 Sup. Ct. 121.

[23] See *Monell* v. *Lawrence* (N. Y. 1815) 12 Johns. 521, 534.

[24] *Hews* v. *Hews* (1906) 145 Mich. 247, 108 N. W. 694.

[25] *Lawrence Mfg. Co.* v. *Jamesville Cotton Mills* (1891) 138 U. S. 552, 11 Sup. Ct. 402.

reason for the distinction is clear. In the ordinary action whether at law or in equity, the parties intend to insist on all their rights. They do not intend to forego the advantage that may be derived from errors of the court. A consent decree is a compromise arrangement. The litigants are willing to barter their respective rights, relinquish their legal claims, subject to a settlement. In fact a consent decree is akin to a contract[26] where A intends to sue, but agrees to forbear in consideration of B paying him a specified sum. At law A can sue, nevertheless, and recover; B's only remedy at law is an action for damages for breach of contract, to the extent of A's previous recovery. Here the equity procedure is self-enforcing.

Whatever hardship the conclusive character of consent decrees may theoretically raise is largely eliminated in practice. At the very outset if the court deems the agreement in any way contrary to "equity and good conscience" it will refuse to issue a decree.[27] After the decree is issued, if its enforcement generally will work a hardship it will be confined to the actual litigants.[28] Privies to the parties will be permitted to file a bill, modifying or setting aside the original order. The usual rule, however, is that a consent decree binds the privies.[29] Again, the decrees are always subject to "construction," [30] and equity courts tend to be liberal. If, for instance, in an action for an accounting, one of the parties not aware of an outstanding item should compromise the claim in ignorance of it, the decree would probably be construed as not including that item.[31] It is true that in a different action a decree was construed as applying to an item not mentioned in a decree,[32] but there the intention of the parties was to settle all claims actual and potential. In short, while equity and law courts construe contracts by the same rule, yet as a consent decree is more a decree than a contract, equity can for all practical purposes waive the parol evidence rule, and inquire into the actual intentions of the parties, though not expressed in the agreement. It will then modify the decree accordingly. Another safeguard from an inequitable consent decree lies in the peculiarities of equity procedure. The usual decre is not self-executing. The plaintiff to compel performance must resort to the aid of a court, and commit the defendant for contempt. On the bill for execution the defendant may argue the injustice of the decree. Equity will not lend its aid to the enforcement of a clearly unjust decree,[33] and as the plaintiff is powerless without the court's aid, he will consent to an equitable modification. Any time the plaintiff invokes the help of a court, the decree may be reopened.[34] The effect of these devices is to make a consent decree conclusive only where (1) it is self-executing, as for a money judgment or partition action, the former of which can be sued on in a court of law as a debt of record, or where (2) the court thinks it sufficiently similar to what it would have decided so that it is willing to enforce it.

While one case has laid down the rule that the issue of a consent decree is merely a ministerial act,[35] nevertheless courts have almost uniformly refused to act when the consent was given in a divorce action.[36] The instability of the

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[26] *Clark* v. *Turnbull* (1884) 47 N. J. L. 265.
[27] *Cf. Anderson* v. *Snyder* (1883) 21 W. Va. 632.
[28] *Lamb* v. *Gatlin* (N. C. 1838) 2 Dev. & Batt. Eq. 37. The decree here was upset collaterally.
[29] *Thompson* v. *Maxwell* (1877) 95 U. S. 391.
[30] *Lee* v. *Lee* (1884) 77 Ala. 412.
[31] See *supra,* footnote 30 for a similar situation.
[32] *Nashville Ry.* v. *United States* (1885) 113 U. S. 261, 5 Sup. Ct. 460.
[33] *Wadhams* v. *Gay* (1874) 73 Ill. 415.
[34] See *supra,* footnote 25.
[35] *Edwards* v. *Turner* (Tenn. Ch. 1897) 47 S. W. 144.
[36] Even a confession of guilt will not be a ground for a divorce without cor-

marital status which consent decrees would encourage, was a sufficient justification for refusing to entertain them. Similarly in the field of criminal law, a defendant must be proved guilty of a capital offense;[37] it is not sufficient for him to consent to the penalty. While these restrictions are widely made, no such considerations operate in prosecutions under such statutes as the Sherman Law. The legislative intention behind its passage was to prevent conspiracies in restraint of trade. Lest a money penalty alone be insufficient to discourage violations, the conspiracies were declared a crime. If threatening an alleged offender with a criminal prosecution can secure his consent to a decree enjoining the practices complained of, certainly such decrees should be sustained.[38] If such a decree were conditioned upon the Attorney General's promise not to prosecute, its validity might be subject to question. Yet the way out would be not to set aside the decree, but to declare the condition null and void.[39] The opportunity which the packers utilized in the instant case, to place their story before the public, should prove a strong inducement for a similar practice on the part of other defendants in a like situation.

THE BANKRUPTCY OF A PARTNERSHIP AND ITS EFFECT UPON THE LIABILITY OF THE INDIVIDUAL PARTNERS.—A partnership may be adjudicated a bankrupt.[1] Insolvency, together with an act of bankruptcy is a basis for such an adjudication. But when is a partnership insolvent, and what effect has an adjudication upon the disposition of the assets of the individual members of the firm? Further, what effect has a firm discharge on the liability of the partners as individuals?

The members of a firm are jointly and severally liable for the debts contracted by the firm, and creditors of the partnership may levy on the individual assets.[2] It is a reasonable rule, then, to hold that a firm cannot be insolvent unless the firm assets, together with the individual assets of the partners after subtracting therefrom debts due on individual account, are insufficient to meet firm debts.[3] In other words, if the firm is insolvent, every member of the firm must have been proved insolvent. This view is clearly recognized by some cases, and, it is quite likely, would be denied by none.

Trustees, after an adjudication against a firm, have very naturally sought to draw individual assets into administration. It perhaps seems surprising that the assets of one not formally adjudicated a bankrupt, should be so administered, and the court in *In re Bertenshaw*,[4] where the adjudication named only the firm, in an exhaustive opinion, denied the trustee the right to administer individual assets.

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robative testimony. See *Monypeny* v *Monypeny* (1916) 171 App. Div. 134, 135, 157 N. Y. Supp. 11.

[37] In regard to other crimes the plea of *nolo contendere* was allowed. This point is discussed in *Commonwealth* v. *Horton* (Mass. 1829) 9 Pick. 206.

[38] Convictions under the Sherman Law have been exceedingly rare due to the difficulty of proof. Such sentences as have been imposed were very light. These facts taken together indicate that the penalty provision was not much of a deterrent. Hence it is good administrative policy to achieve by threats what one could scarcely accomplish directly.

[39] An analogy is found in those cases where A sells his business property to B, and covenants not to engage in that business again. Under certain circumstances the covenant is held void. See (1921) COLUMBIA LAW REV. 599.

[1] Bankruptcy Act of 1898 § 5 (a).

[2] Uniform Partnership Act § 15; *cf.* English Partnership Act of 1890 § 9; see *People* v. *Knapp* (1912) 206 N. Y. 373, 382, 99 N. E. 841.

[3] *Vaccaro* v. *The Security Bank* (C. C. A. 1900) 103 Fed. 436; *In re Young et al.* (D. C. 1915) 223 Fed. 659; *State* v. *Krasher* (1908) 170 Ind. 43, 83 N. E. 498; see *Matter of Wing Yick Co.* (D. C. Hawaii 1905) 13 A. B. R. 757.

[4] (C. C. A. 1907) 157 Fed. 363.